SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 56

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 In United States District Court, Eastern District of Virginia

Civil Action No. 321

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed March 17th, 1944

To the Honorable the Judge of the District Court of the United States for the Eastern District of Virginia:

Your petitioners, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties of Seaboard Air Line Railway Company, with its principal office in the City of Norfolk, in the Eastern District of Virginia, respectfully show to the Court the following case, to wit:

2 1. Petitioners are citizens and residents of the Eastern District of Virginia and are duly qualified Receivers of the properties of Seaboard Air Line Railway Company, a common carrier by railroad, engaged in the carriage of freight and passengers in interstate and intrastate commerce, appointed by orders of the District Court of the United States for the Eastern District of Virginia and by orders of the District Court of the United States for the Southern District of Florida, in ancillary receivership proceedings instituted and still pending in said Court.

2. This action is brought under paragraph 20 of Section 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093, as amended, 28 U. S. Code Section 41 (20). The petitioners' claim does not exceed $10,000.00 and is founded upon a contract with the Government of the United States, defendant herein, as hereinafter more fully appears.

3. Defendant is indebted to petitioners in the sum of Six Hundred and Thirty-seven Dollars and Fifty-four Cents ($637.54), being the unpaid balance of the sum of Seven Hundred and Thirty-three Dollars and Seventy-nine Cents ($733.79) rightfully due in full from defendant to petitioners for services in carriage by petitioners on their line of railroad in the year 1942 of various carload shipments of woodpulp transported for and on behalf of defendant from Savannah, Georgia, to Norfolk, Virginia, con-

shipments to British Ministry of War Transport, the said shipments having been moved upon Government bills of lading duly authorized and issued.

Defendant has never questioned correctness of the charge in the said amount of $733.79 for the services in respect of which the same was made, and on the 14th day of September, 1942, defendant paid petitioners $96.25, leaving still owing and unpaid the said balance of $637.54.

Annexed to this petition and made a part hereof is a statement of compilation marked "Exhibit to Petition" showing
3 the details of the transportation services performed as aforesaid, including references to General Accounting Office settlements or Government check numbers, date of receipt of Government check (in payment on account as aforesaid) and references to the lawfully published and effective tariffs showing the freight rate applicable to the transportation of the shipments involved.

4. Said sum of $96.25 was accepted by petitioners under protest and as part payment only. Petitioners subsequently rendered their bill to defendant for the unpaid balance of said transportation charges which defendant has withheld and still fails and refuses to pay in whole or in part.

Wherefore, petitioners pray for a judgment or decree against the United States upon the facts and law for said Six Hundred and Thirty-seven Dollars and Fifty-four Cents ($637.54).

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY,

Petitioners,

By (Sgd.) W. R. C. Cocke,
W. R. C. COCKE,

(Sgd.) Thomas L. Preston,
THOMAS L. PRESTON,

(Sgd.) F. S. SARGEANT,
Counsel for Petitioners,
550 S. A. L. Railway Building, Norfolk, Virginia.

[*Duly sworn to by Legh R. Powell; jurat omitted in printing.*]

Exhibit to petition

From—Savannah, Ga.
Shipper—Union Bag and Paper Co.
Consignee—British Ministry of War Transport, c/o Furness Withy & Co., Norfolk, Va.
Route—S. A. L. Ry. Direct.
Articles—Rolls Wood Pulp, N. O. I. B. N.

S. A. L. Ry. bill July 1942 number	Bill of Lading		Car		Delivered on or about	Weight (in pounds)	Applicable tariff rate	Amount claimed	Amount paid	Balance claimed	Reference to general accounting office settlement and Government check number
	Number	Date	Initials	Number							
PD-7-23	204560	6-14-42	Erie	81714	6-17-42	52343	#23 (¢ per cwt.)	$120.60			General Accounting Office Notices of Exception August 5, 1942, to DO-Vouchers 574384 $472.81 and 760926 $164.73, S. A. L. Ry. Bills TD-130-140 and TD-130-199 respectively.
			SAL	11832	6-17-42	51499	23 (¢ per cwt.)	118.45			
			ACL	51928	6-17-42	52689	23 (¢ per cwt.)	121.18			
			NYC	153984	6-17-42	56681	23 (¢ per cwt.)	130.37			
			ACL	13212	6-17-42	53196	23 (¢ per cwt.)	122.35			
			B&LE	90265	6-17-42	52539	23 (¢ per cwt.)	120.84			
						319038		733.79	$96.25	$637.54	Amount $96.25 paid by U. S. Treasury Warrant No. 52595, Certificate No. 415195.

Tariff Authorities:
Agent C. A. Spaninger's Southern Export Tariff. 705-E, I. C. C. 729 and
Agent C. A. Spaninger's Tariff of Increased Rates & Charges x 148, I. C. C. 229.

5 In United States District Court

Answer and counterclaim

Filed June 27th, 1944

Answer

The defendant, the United States of America, appearing by Harry H. Holt, United States Attorney for the Eastern District of Virginia, for answer to the petition says:

1. Admits the allegations in Paragraphs 1, 2 and 4 and the second and third sentences in paragraph 3.

2. Denies that it is indebted to petitioners in the sum of $637.54 or any part thereof.

Counterclaim

For its counterclaim defendant alleges:

3. In or about August 1941, petitioners carried on Government bills of lading and billed defendant in the amount of $2,608.70 for phosphate rock and $546.17 for superphosphate consigned to the British Ministry of War Transport. The petitioners' freight charges were computed at the commercial rate without benefit of land-grant deductions.

4. Defendant paid the bills in the full amounts claimed, notwithstanding that the said phosphate rock and superphosphate were intended for export, to promote the defense of the United States, under the land-lease program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53).

The phosphate rock and superphosphate were military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deductions (Section 321 (a) of the Transportation Act of 1940, approved September 18, 1940, 54 Stat. 898, 954, Title 49 U. S. C., Section
6 65 (a)).

5. By means of charges at the commercial rate the defendant overpaid petitioners $472.81 on the shipments of phosphate rock and $164.73 on the shipments of superphosphate. Petitioners have never repaid any part of such overcharges.

6. The defendant deducted the sum of the said overpayments from the $733.79 due on petitioners' bill No. PD-7-23 and Government Bill of Lading No. D. A. TPS-204560, as thereunto specifically authorized by section 322 of the Act of September 18,

1940, 54 Stat. 898, 955, Title 49, U. S. C., Section 66, and paid petitioners the balance of $96.25.

Wherefore, defendant prays for judgment on its counterclaim in the amount of $637.54, and that said amount be set off against petitioners' claim herein, and that petitioners' complaint be dismissed at their cost.

(Sgd.) Francis M. Shea,
FRANCIS M. SHEA,
Assistant Attorney General,
(Sgd.) Harry H. Holt, Jr.,
HARRY H. HOLT,
United States Attorney,
Attorneys for Defendant.

7 In United States District Court

Reply to counterclaim

Filed June 30th, 1944

Petitioners, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, for reply to the counterclaim of the defendant set forth in paragraphs 3 to 6 inclusive, of the Answer filed herein, say:

1. Replying to paragraph 3 of said Answer, petitioners admit the averments thereof.

2. Replying to paragraph 4 of said Answer, petitioners admit that defendant paid in full the bills referred to in said paragraph, and that the phosphate rock and superphosphate mentioned in said paragraph were intended for export under the lend-lease program. Except as herein expressly admitted, the allegations of said paragraphs are denied. Specifically, petitioners deny that said phosphate rock and superphosphate were military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deductions, as in said paragraph 4 alleged.

3. Replying to paragraph 5 of said Answer, petitioners deny that defendant overpaid petitioners on the shipments of phosphate rock and superphosphate in the amounts alleged in said paragraph, or any other amounts whatsoever.

4. Replying to paragraph 6, of said Answer, petitioners admit that defendant deducted the sum of the alleged overpayments from the $733.79 due on petitioners' bill No. P. D. 7-23 and Govern-

ment Bill of Lading No. D. A. TPS–204560, and paid petitioners the balance of $94.25, as alleged in said paragraph, but deny that said deductions were authorized by law.

8 Wherefore, petitioners pray that defendant's counterclaim be dismissed and further pray for judgment on their Petition in the amount of $637.54.

(Sgd.) W. R. C. Cocke,
W. R. C. Cocke,
(Sgd.) Thomas L. Preston,
Thomas L. Preston,
(Sgd.) F. S. Sargeant,
F. S. Sargeant,
Attorneys for Petitioners,
Seaboard Air Line Rwy. Bldg., Norfolk, Virginia.

9 In United States District Court

Stipulation of facts

Filed October 27, 1944

It is stipulated and agreed by and between petitioners, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, hereinafter called "Seaboard", and defendant, The United States of America, hereinafter called "United States", that:

1. During July, 1942, the Seaboard rendered its bill (PD–7–23) against the United States in the sum of $733.79 for freight charges on six carloads of wood pulp which had been transported by the Seaboard from Savannah, Georgia, to Norfolk, Virginia. The United States did not question the correctness of said charges, but deducted from the amount due the sum of $637.54, and on September 14, 1942, paid to the Seaboard the balance of $96.25. The sum of $96.25 was accepted by the Seaboard, but under protest and as part payment only. The Seaboard instituted this action to recover the balance due on said bill, to wit, the sum of $637.54, and the United States has filed herein its counterclaim for the deduction made from said bill.

2. The facts in connection with the said counterclaim are:

On or about August 5, 1941, fifty-six (56) cars of phosphate rock moved on Government bill of lading DA–TPS–190186 as one shipment from Brewster, Florida, to Tampa, Florida, over the Seaboard, consigned to the British Ministry of War Transport. A copy of the bill of lading covering this shipment is attached hereto as a part hereof, marked "Exhibit 1."

On September 5, 1941, the Seaboard submitted to the Treasury Department of the United States, Procurement Division, its bill (TD–130–140) for $2,608.70, covering the transportation charges on this shipment, based on the commercial rate.

A copy of this bill is attached as a part hereof, marked "Exhibit 2." It is agreed that the charges set out in this bill are at the commercial rate. On or about September 30, 1941, the United States paid this bill as rendered.

On August 5, 1942, the General Accounting Office of the United States took exception to this payment by notice directed to the Seaboard. This notice of exception, so far as material, reads:

"Bill No. TD–130–140.

"B/L DA–TPS–190186. August 5, 1941. Phosphate rock. Brewster, Florida, to Tampa, Florida (For export). Paid $2,608.70. Should be $2,135.89. Difference $472.81.

"Thru rate 75¢ Gross Ton as per SFA Tariff 705–D. Rate applies via SAL and is subject to 24.891% L. G. Making net rate of 56.332¢ per Gross Ton. To this rate is added 25¢ per Gross Ton for wharfage at Tampa.

"Shipments are military or naval property and subject to land grant deductions."

During August 1941, twenty-two (22) cars of superphosphate moved on Government Bills of Lading Nos. DA–TPS–190194, 190196, 190197, 190195 and 190223, from Nichols, Florida, to Tampa, Florida, over the Seaboard consigned to the British Ministry of War Transport. Copies of these bills of lading are attached hereto as a part hereof, marked, respectively, "Exhibits 3 (a) to 3 (e)," inclusive.

On September 17, 1941, the Seaboard submitted to the Treasury Department of the United States, Procurement Division, its bill (TD–130–199) for $546.17, covering the transportation charges on these shipments computed on the commercial rate. A copy of this bill is attached hereto as a part hereof, marked "Exhibit 4." It is agreed that the charges set out in this bill are at the commercial rate. On or about October 28, 1941, the United States paid this bill as rendered.

On August 5, 1942, the General Accounting Office of the United States took exception to this payment by notice directed to the Seaboard. This notice of exception, so far as material, reads:

"Bill No. TD–130–199.

"B/L See Below. August 1941. Superphosphate. Nichols, Florida, to Tampa, Florida. Paid $546.17. Should be $381.44. Difference $164.73.

"Rate 75¢ NT SFA 392–C. Subject to 30.159% L. G. via SAL. Net rate 52.381¢ NT

B/L DA-TPS	Paid	Should be	Overpaid
190194	573.66	343.98	229.68
190195	133.16	97.41	37.75
190197	102.41	71.59	30.82
190196	102.41	71.82	30.59
190257	146.33	98.01	43.32
	846.17	381.44	164.73

Shipments are military property for military use."

In accordance with the aforesaid notices of exception the United States deducted from the bill herein sued upon the sum of $637.54, that being the aggregate amount of the overpayments claimed in said notices of exception, and by its answer herein the United States sets up its counterclaim in the amount of such deduction.

On October 12, 1943, the Comptroller General of the United States made a ruling B–29861 concerning sundry deductions from Seaboard charges account land-grant rates as applied to shipments of phosphate rock and superphosphate, including the deduction upon which the counterclaim herein is based. A copy of this ruling is attached hereto as a part hereof, marked Exhibit 5.

3 (a) The phosphate rock and superphosphate shipments in respect of which the deduction aforesaid was made moved to Tampa, Florida, consigned to the British Ministry of War Transport, an agency which is a duly authorized representative in the United States of His Majesty's Government in the United Kingdom. This phosphate rock and superphosphate was exported to England under the Lend Lease Program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53). Copies of the contract covering the purchase of this material are attached hereto as a part hereof respectively marked Exhibit 6 and 7.

3 (b) The Seaboard, within the period provided there-
12 for by Section 321 (b) of the Transportation Act of 1940 (54 Stat. 898, 954), duly filed with the Secretary of the Interior the release provided for in said Section.

3 (c) The shipments of phosphate rock and superphosphate in question were at the time of their transportation the property of the United States. If they were at the time of their transportation by the Seaboard 'military or naval property of the United States moving for military or naval and not for civil use' within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, the counterclaim asserted by the United States is valid and should be allowed in the amount stated. Otherwise judgment should be rendered in accordance with the prayer of the petition herein.

4. The parties reserve the right to present evidence as to the nature and intended use of the shipments of phosphate rock and

superphosphate in question, and of such further facts as may be relevant, not inconsistent with this stipulation.

LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers of the properties and assets of Seaboard Air Line Railway Company,
Petitioners,

By (Sgd.) W. R. C. COCKE,
(Sgd.) THOMAS L. PRESTON,
(Sgd.) F. S. SARGEANT,
Counsel.

THE UNITED STATES OF AMERICA,
Defendant.

By (Sgd.) HARRY H. HOLT, JR.,
Counsel.

13 *Exhibit 1 to stipulation of facts*

18 List No. 1

SEABOARD AIR LINE RAILWAY

L. R. POWELL, JR., & HENRY W. ANDERSON, RECEIVERS

TAMPA, FLA., *Aug. 5th, 1941.*

WEIGHT STATEMENT

Steamer—"Prince de Liege."
Account—American Cyanamid Co.
Commodity—Phosphate Rock.

Number and initial	Gross	Tare	Net	Freight	
87430 SAL	140,000	42,200	97,800	32.64	
87526	130,200	42,700	87,600	30.33	
87529	136,300	42,000	94,300	31.64	
55366	151,200	44,400	106,800	35.78	
50601	136,000	42,000	94,000	31.47	
87498	130,200	42,300	88,900	29.11	
58174	179,900	50,600	129,300	43.29	
58045	179,100	50,700	128,400	42.99	
58127	181,100	50,800	130,300	43.63	
87587	148,400	41,900	106,500	35.69	
88874	125,000	43,800	81,200	27.19	
87413	139,100	42,900	96,200	31.98	
87494	137,100	43,000	94,100	31.51	
58131	172,000	49,400	122,600	41.05	
58053	165,500	50,700	114,800	38.44	
55529	124,700	44,100	80,600	26.99	
50754	126,800	41,900	84,900	28.43	
87448	127,400	41,900	85,500	28.63	
56709	125,100	42,000	83,100	27.83	
58019	163,400	50,500	112,900	37.80	
87455	127,500	42,500	85,000	28.46	
88532	110,600	43,800	72,800	24.38	
58092	164,700	50,600	114,100	38.20	
50665	132,400	42,000	90,400	26.27	
55515	117,700	43,900	73,800	24.71	
87517	134,100	43,000	91,100	30.50	
58100	116,900	40,500	76,400	25.58	
88004	116,700	41,900	75,700	25.35	
88008	115,400	43,600	71,800	24.04	
	4,087,800	1,389,900	2,798,900	936.44	1235.2282 tons

19 List No. 2

SEABOARD AIR LINE RAILWAY

L. R. POWELL, JR., & HENRY W. ANDERSON, RECEIVERS

TAMPA, FLA., *August 5th, 1941.*

WEIGHT STATEMENT

Steamer—"Prince de Liege,"
Account—American Cyanamid Co.
Commodity—Phosphate Rock.

Number and Initial	Gross	Tare	Net	Freight	
57321 SAL	142, 600	42, 000	100, 600	33. 68	
55073	126, 000	41, 300	84, 700	28. 36	
58087	197, 100	50, 700	146, 400	49. 02	
58024	195, 500	53, 900	142, 600	47. 75	
58149	170, 000	50, 800	119, 200	39. 91	
58036	185, 300	49, 600	135, 700	45. 44	
57328	149, 200	42, 200	107, 000	35. 83	
55539	128, 300	43, 800	84, 500	28. 29	
57524	148, 000	42, 400	105, 600	35. 36	
56661	133, 000	42, 100	90, 900	30. 44	
55534	119, 100	43, 800	75, 300	25. 21	
56648	140, 700	41, 900	98, 800	33. 08	
57469	125, 700	42, 700	83, 000	27. 79	
58199	163, 200	50, 700	112, 500	37. 67	
58063	173, 300	50, 700	122, 600	41. 02	
55593	133, 600	44, [illegible]	89, 100	29. 93	
58122	180, 300	49, 5[illegible]	130, 800	43. 79	
56788	131, [illegible]00	41, 800	89, 300	29. 90	
56602	135, 300	41, 600	93, 700	32. 38	
57445	146, 400	42, 200	107, 200	35. 89	
56789	134, 000	41, 900	92, 100	30. 84	
57430	153, 400	43, 300	110, 100	36. 86	
57562	142, 700	42, 100	100, 600	33. 68	
58157	201, 700	50, 700	151, 000	50. 56	
58031	178, 800	50, 700	128, 100	42. 88	
57452	154, 100	42, 900	111, 300	37. 22	
56786	132, 300	41, 700	90, 600	30. 32	
	4, 124, 700	1, 218, 300	2, 906, 400	972. 10	1, 297. 5000 Tons
Sheet #1	4, 057, 800	1, 290, 900	2, 766, 900	926. 44	1, 235. 2232 Tons
	8, 182, 500	2, 509, 200	5, 673, 300	1, 899. 54	2, 532. 7232 Tons

I hereby certify that I have delivered to the SS PRINCE DE LIEGE 2532.7232 gross tons Florida Land Pebble Phosphate Rock in bulk.

_____, _____,
Agent.

_____, _____,
Notary Public.

Notary Public, State of Florida at large. My commission expires July 24, 1944.

20 GENERAL ACCOUNTING OFFICE

NOTICE OF EXCEPTION

August 5, 1942

To: G. F. Allen, Disbursing Freight Officer.
Cert. Officer, P. J. Carey.
Dept. or Bureau, Treasury, Procurement Division.
Appropriation, Defense Aid, Agricultural, Industrial and Other Commodities (Allotment to Treasury) 1941–1943.
D. O. Vou. No. 574384.
Bu. Vou. No.
Period September 1941.
Activity, Transportation.

Credit for $472.81 paid to Seaboard Air Line Railway will be withheld or a charge will be raised in your next statement of settlement for the reason stated below unless a satisfactory explanation is promptly made or the amount deposited:

Bill No. TD–130–140.

B/L DA–TPS–190186. August 5, 1941. Phosphate Rock. Brewster, Florida to Tampa, Florida (For Export). Paid $2,608.70. Should be $2,135.89. Difference $472.81.

Thru rate 75¢ Gross Ton as per SFA Tariff 705–D. Rate applies via SAL and is subject to 24.891% L. G. Making net rate of 56.332¢ per Gross Ton. To this rate is added 28¢ per Gross Ton for wharfage at Tampa.

Shipments are military or naval property and subject to land grant deductions.

abb. Wk. No. 56253.

LINDSAY C. WARREN,
Comptroller General of the United States.

REPLY TO EXCEPTION

Deduction made on bill #PD–7–23, Bur. Vou. #12482 D O #415195. Paid in the August 1942 Accounts of *G. F. Allen*, Symbol #223750, 20–111/30026.

I certify the foregoing explanation to be true and correct to the best of my knowledge and belief.

G. F. ALLEN, *Chief Disbursing Officer.*

Date Oct. 5, 1942.

39 *Exhibit 5 to Stipulation of Facts*

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-29861.

OCTOBER 12, 1943.

Mr. W. D. STEELE, *Auditor of Revenues,*
Seaboard Air Line Railway, Portsmouth, Va.

DEAR MR. STEELE: Reference is made to your letter of July 2, 1943, file 459-A, and prior letter, therein mentioned, concerning claims for additional allowances aggregating $23,423.12, alleged to represent land-grant deductions from commercial transportation charges otherwise payable for transporting certain shipments of phosphate rock from several mines in Florida to Tampa, Florida, in 1941. Your contention, as stated in your letter of October 20, 1942, is that such land-grant deductions are not in order for the principal reason that the use of the property shipped was "for fertilizer for raising the crops of the British people" and that, therefore, the several shipments here involved cannot be viewed as having consisted of "Military or Naval property" moving for "military" use within the meaning of section 321 of the Transportation Act of 1940.

As illustrative of the shipments here involved there has been selected bill No. TD-130-134, which was presented originally for $5,150.45 determined in pertinent part on the basis of a rate of $0.75 per long ton for the transportation of 98 cars of phosphate rock, aggregating 5000.4464 long tons, shipped by the Coronet Phosphate Company from Coronet, Florida, consigned to the British Ministry of War Transport, care of E. H. Buck, Wallace S. Building, Tampa, Florida, under bill of lading DA-TPS-190175, August 1, 1941. The amount so claimed was paid by G. F. Allen, chief disbursing officer, Treasury Department, on voucher No. 574386 of his September, 1941, account, from appropriation "20-111/30026 Defense Aid, Agricultural, Industrial and Other Commodities (Allotment to Treasury) 1941-1943." However, the record indicates that thereafter the disbursing officer, pursuant to a notice of suspension of credit in the amount $1,657.09 made in the audit of said voucher because of the failure to make deduction for land grant from said charges, deducted the amount of $1,657.09 in making payment on voucher No. 502331 of his September, 1942, account from amounts otherwise due the carrier on its bill No. Pd-7-94. The amount so deducted is a part of the sum of $14,225.03 claimed in your letter of October 20, 1942.

Section 321 of the Transportation Act of 1940, 54 Stat. 898, 954, provides, in pertinent part, that—

"Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

It is indicated on the bill of lading covering this shipment that the phosphate rock there described was purchased under contract "DATPS–454." The statement and certificate of award relating to said contract states that the purchase of the material was made "pursuant to the provisions of the Act of March 11, 1941, Public, No. 11, and the Act of March 27, 1941, Public, No. 23, to promote the defense of the United States and for other purposes." The contract specifies that the material was purchased for delivery by the contractor f. o. b. Coronet, Florida.

The last mentioned act, being "An Act to Promote the Defense of the United States," approved March 11, 1941, 55 Stat. 31, defines the term "defense article," as used therein, as including "Any agricultural, industrial or other commodity or article for defense," and provides that the President "when he deems it in the interest of national defense" may authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government "To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government [i. e. the government of any country whose defense the President deems vital to the defense of the United States] any defense article * * *."

With reference to the shipment here concerned the Treasury Department—the procuring agency in this instance—has invited attention to a transfer authorization contained in a transfer directive of the President to the Secretary of the Treasury, dated October 1, 1941, which related to the transfer to the "appropriate officer or representative of His Majesty's Government in the United Kingdom" of "the defense articles covered by the requisitions enumerated on the attached table." Among the requisitions so listed was requisition No. 1133 for 435,000 short tons of phosphate rock. The Treasury Department in further reporting to this office in connection with this shipment, after inviting at-

tention to the above-quoted provisions of the act of March 11, 1941, supra, states:

"* * * Furthermore, this Department has consistently regarded the transportation of defense articles purchased under the Lend-Lease Act as transportation of military property. Since such transportation in which the carrier is involved represents transportation in the defense of the United States, there does not appear to be any inconsistency in regarding such transportation as transportation for military use as distinguished from a civilian use. * * *"

And adds:

"Without conceding that such fact has any bearing on the question, you are advised that, because of the large phosphorous content in the phosphate rock of the type under consideration, such material is generally used as fertilizer and the requisition. (BSC 1133) pursuant to which the foregoing contract was negotiated states that the material is to be used for agricultural purposes. However, such material, if the need therefor arises, has a number of other uses in articles not connected with agriculture, such as the manufacture of tracer bullets, flares, etc."

Likewise a communication since received from the Lend-Lease Administration, relative to the general question of the right of the United States to deduction for land grant from charges for the transportation of "defense articles" under the lend-lease program, shows that substantially the same position has been taken by the Lend-Lease Administration. The administrative views so indicated are for consideration in the light of the rule that where a statute is indefinite or ambiguous the construction given it by the executive department or agency to which is intrusted the execution of the statute is entitled to much weight. Hall-Scott Motor Car Co. v. United States, 77 C. Cls. 674; Beirnie S. Bullard, Admx. v. United States, 66 C. Cls. 264.

Accordingly, I have reached the conclusion that, in the absence of a judicial determination of the matter, this office would not be justified in modifying the settlements here in question so as to certify any additional allowance on the basis that the shipments involved do not constitute military property moving for military use. In this connection it may be added, as a matter of information, that there has come to attention the fact that two suits involving the question of the right of the United States to deduction for land grant from charges for the transportation of articles shipped pursuant to the lend-lease program have been filed against the United States recently by the Southern Pacific Company—one in the Court of Claims of the United States and one in the

United States District Court for the Eastern District of Kentucky.

Respectfully,

(S) LINDSAY C. WARREN,
Comptroller General of the United States.

70 In United States District Court

Supplemental stipulation of facts

Filed November 20th, 1944

It is stipulated and agreed between the plaintiffs and defendant herein, subject to objection as to the relevancy or competency of the evidence, as follows:

The shipments involved in the counterclaim were "defense articles" as defined in the Act of March 11, 1941, Public No. 11 (55 Stat. 31).

When requisition is made by any country the defense of which the President deems vital to the defense of the United States, such requisition is carefully considered and scrutinized. It is then accepted, modified or rejected in accordance with the determination by the President or his duly authorized representative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the materials requisitioned will promote the defense of the United States in accordance with the provisions of the Lend-Lease Act.

In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply. Imports were further restricted by shortage of shipping. Great Britain therefore found it necessary to revise her agricultural practices in order to intensify production of food for direct human consumption. It was necessary to put into production a large acreage of land not normally used for the production of food for direct human consumption, and phosphate fertilizers had
71 to be imported and distributed to effectuate this revised agricultural program. The shipments of phosphate rock and superphosphate comprised a part of that program. Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act. In 1941, the United States was the only practical source from which Great Britain could acquire such materials.

It is further stipulated and agreed that either party may refer to the official published reports made to Congress by or on behalf of the President pursuant to the terms of the Lend-Lease Act, and to rulings of the Comptroller General, without objection, and without their formal introduction in evidence.

It is further stipulated and agreed that the attachment hereto marked "Exhibit A" is a true copy of a letter dated September 21, 1943, from E. R. Stettinius, Jr., Lend-Lease Administrator, to Roy F. Hendrickson, Deputy Food Administrator, War Food Administration, and that such letter is the communication from the Lend-Lease Administrator referred to in the Comptroller General's Ruling No. B-29861, a copy of which ruling constitutes Exhibit No. 5 to the Stipulation of Facts first filed herein.

LEGH R. POWELL, JR., AND
HENRY W. ANDERSON,
as Receivers of the Properties and Assets of Seaboard Air Line Railway Company,
Petitioners.

By (Sgd.) W. R. C. Cocke,
W. R. C. COCKE,
(Sgd.) Thomas L. Preston,
THOMAS L. PRESTON,
(Sgd.) F. S. Sargeant,
F. S. SARGEANT,
Counsel.

THE UNITED STATES OF AMERICA,
Defendant.

By (Sgd.) HARRY H. HOLT, JR.,
Counsel.

72 *Exhibit "A" to supplemental stipulation of facts*

OFFICE OF LEND-LEASE ADMINISTRATION
Five-Fifteen 22nd Street NW.
WASHINGTON, D. C.

SEPTEMBER 21, 1943.

Re: Applicability of Land-Grant Deductions to Lend-Lease Shipments

DEAR ROY:

The question has been raised as to whether, and the extent to which, land-grant deductions are available from charges imposed by certain common carriers for transporting property procured

and shipped pursuant to the Lend-Lease Act ("An Act to promote the defense of the United States", approved March 11, 1941, as amended).

The question is one with which the various agencies procuring and shipping lend-lease commodities and materials have had to deal. I am informed that there has been a difference of opinion in some cases among representatives of such agencies.

Whether or not lend-lease shipments are entitled to land-grant deductions depends upon the interpretation of Section 321, Part 2, Title 3, of the Transportation Act of 1940 (49 U. S. Code, Section 65). This section provides that the full applicable commercial rates shall be paid for the transportation of any persons or property of the United States, "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use." Our General Counsel has advised me that in his opinion, all shipments of lend-lease materials and commodities intended for transfer to a foreign government constitute military or naval property of the United States intended for military or naval use and not for civil use within the statute in question, for reasons which may be briefly summarized as follows:

The declared purpose of the Lend-Lease Act is "further to promote the defense of the United States". It empowers the President when he deems it to be in the interest of our national defense to authorize the head of any department or agency of the government to procure any defense article "for the government of any country whose defense the President deems vital to the defense of the United States" and to dispose of such defense articles to any such government.

The term "defense article" as used in the Lend-Lease Act is defined in such manner as to include not only articles "any agricultural, industrial, or other commodity or article for defense." Correspondingly, the various acts appropriating funds to carry out the provisions of the Lend-Lease Act include, among others, funds for the purchase of such "agricultural, industrial, and other commodities and articles."

The use made by the United States of all lend-lease materials is to promote the defense of the United States, which is clearly a military and not a civil use. It is this use which is determinative and controlling, rather than the use to which the goods may
73 ultimately be put by the government to which they are transferred. There is therefore no need to inquire into such ultimate use. It is sufficient that the property is being shipped by the United States Government in the interests of its national defense and its military policy.

Similar letters are being submitted to the other government departments and agencies which procure and ship lend-lease materials and commodities, and a copy is being sent to the Comptroller General. I think that all agencies procuring lend-lease materials and commodities should uniformly take the position that shipments of lend-lease materials and commodities intended for transfer to a foreign government comprise military or naval property of the United States moving for a military or naval and not for a civil use within the contemplation of Section 321 of the Transportation Act of 1940, and are, therefore, entitled to the land-grant deductions applicable to such property.

Will you please advise me if the foregoing meets with your approval?

Sincerely yours,

(S) E. R. STETINIUS, Jr.,
Lend-Lease Administrator.

Mr. ROY F. HENDRICKSON,
Deputy Food Administrator, War Food Administration,
319 W. Administration Bldg.,
Department of Agriculture, Washington, D. C.

74 In United States District Court

Civil Action No. 321

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Opinion of the court

Filed March 24th, 1945

This is a suit brought under Paragraph 20 of Section 24 of the Judicial Code of March 3, 1911, 36 Stat. 1093, as amended, 28 U. S. C. A., Section 41 (20), known as the Tucker Act.

The parties have entered into statements of agreed facts, respectively denominated "Stipulation of Facts" and "Supplemental Stipulation of Facts", with certain exhibits attached thereto.

The claim sued upon is for unpaid transportation charges in the amount of $637.54, in respect of which the stipulation of facts reads as follows:

"During July, 1942, the Seaboard rendered its bill (PD-7-23) against the United States in the sum of $733.79 for freight charges on six carloads of wood pulp which had been trans-
75 ported by the Seaboard from Savannah, Georgia, to Norfolk, Virginia. The United States did not question the correctness of said charges, but deducted from the amount due the sum of $637.54, and on September 14, 1942, paid to the Seaboard the balance of $96.25. The sum of $96.25 was accepted by the Seaboard, but under protest and as part payment only. The Seaboard instituted this action to recover the balance due on said bill, to-wit, the sum of $637.54, and the United States has filed herein its counterclaim for the deduction made from said bill."

The pertinent facts as to the counterclaim asserted by the United States, as shown by the stipulation of facts, are as follows:

During August, 1941, fifty-six (56) carloads of phosphate rock, property of the United States, were transported over the Seaboard from Brewster, Florida, to Tampa, Florida, consigned to the British Ministry of War Transport, an agency representative in the United States of His Majesty's Government in the United Kingdom. The shipment moved for export, and was exported, to England under the Lend Lease Program, Act of March 11, 1941, Public No. 11 (55 Stat. 31) and Act of March 27, 1941, Public No. 23 (55 Stat. 53). In due course, upon bill rendered, the United States paid to the Seaboard for transportation of this shipment the sum of $2,608.70.

During the same month several shipments aggregating twenty-two (22) carloads of superphosphate, property of the United States, were transported over the Seaboard from Nichols, Florida, to Tampa, Florida, likewise consigned to the British
76 Ministry of War Transport. These shipments also moved for export, and were exported, to England under the Lend-Lease Program. Upon bill rendered, the United States paid to the Seaboard for transportation of these shipments the sum of $546.17. On all shipments the Seaboard's charge was computed at full commercial tariff rates for like services to the general public.

In August, 1942, upon post audit, the United States notified the Seaboard that it took exception to the bills for $2,608.70 and $546.17, both of which it had already paid in full. It was claimed that the bills in question included overcharges in the respective amounts of $472.81 and $164.73, or a total overcharge of $637.54. Accordingly, this amount was deducted from the unpaid bill for $733.79 covering the shipment of wood pulp above mentioned, and the balance of $96.25 only was paid.

The exception taken by the United States to the bills rendered by the Seaboard for transportation of the phosphate rock and superphosphate shipments above described, was based upon the contention that these shipments constituted "military or naval property of the United States moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.[1] If this contention be sound,
77 the shipments were entitled to move subject to so-called "land grant" deductions from the full commercial rates, as hereinafter explained. It is not disputed that the deduction made was accurately computed. But, as set forth in petitioners' Reply to Counterclaim, "petitioners deny that said phosphate rock and superphosphate were military or naval property of the United States moving for military or naval and not for civil use, and entitled to land-grant deductions."

No controversy exists as to the validity of the claim sued upon independently of the foregoing counterclaim set up by way of defense. If the counterclaim asserted is valid, the suit should be dismissed, and if not valid, judgment should be rendered the plaintiffs in accordance with the prayer of the petition. This is agreed upon between the parties and so appears from the stipulation.

Reduced to simple terms, the question is whether the phosphate rock and superphosphate constituting the shipments involved, constituted "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of the Transportation Act of 1940.

The contentions of the respective parties have been ably presented by both oral argument and briefs.

In approaching the subject it is helpful to give some consideration to the history of both the Transportation Act and the Lend-Lease Act.

78 During the early years of expanding railroad development the United States granted public lands to numerous railroads, particularly in the West and to many in the South. The underlying policy of the Government was to encourage the building of railroads in unsettled or sparsely settled areas to facilitate the development of such areas and to ultimately afford additional markets and sources of produce to the more congested sections of the country and to provide a means of transporting troops and military equipment in time of need. Among the roads

[1] "SEC. 321 (a). Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any * * * property of the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States * * * when such members are traveling on official duty; * * *."

to which such grants were made were certain corporations which were predecessors in title of the Seaboard (the plaintiff here). This result in respect of the Seaboard was accomplished through grants directly to the State of Florida and by that State in turn to such corporations. The original grant was made for the construction of a main line of railroad from Fernandina to Tampa Bay and a branch line from Waldo to Cedar Key and contained the following condition:

"and the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charges upon the transportation of any property or troops of the United States." Act of May 17, 1856 (Section 3) (11 Stat. 15).

Similar conditions were imposed by the terms of other grants.

In Lake Superior and Mississippi Railroad Company v. United States, 93 U. S., 442 (decided in 1877), the Supreme Court construed the condition of such grant as reserving to the
79 Government only the free use of the road bed as a highway but held that the railroad could not be required to transport over such road troops or property of the Government free of charge.

Following the foregoing decision the Court of Claims held, that by reason of the right of the Government as provided in the reservation to use the road bed, a reduction of fifty per cent in rates should be allowed by the railroad in transporting such property. Thus the Government bore 50% of the total burden of such transportation in the form of its right to use the road bed and the railroad was paid the remaining 50% as compensation for the use and operation of its equipment.[3]

In 1924 an act was passed by Congress vesting in the Secretary of War authority to fix such rates for the transportation of property or troops of the United States over land grant roads as he deemed just and reasonable, but not exceeding 50% of the full amount of compensation for like transportation performed for the public at large. Act of June 7, 1924, c-291, Title I, 43 Stat., 486; 10 U. S. C. A., 1375. By virtue of the decisions cited and the Act of 1924, the railroads transported over those portions of their respective lines constituting the "land grant" portions, all property of the United States, as well as troops without limitation as to the nature of the property.

80 Attention is directed to the fact that the Secretary of War was the official designated under that Act to fix the rates. Such designation was probably due to the recognition by

[3] A. T. & S. F. R. R. Co. v. United States, 15 Court of Claims Reports, 126.

Congress of the fact that the bulk of railroad traffic in which the Government was interested was military property.

Being desirous of participating in the traffic, competing lines not subject to the so-called land grant rates entered into what has been designated as "equalization agreements" to meet the rates of the "land grant" roads. With such agreements the case at bar is not concerned except as suggesting the far reaching effects on the rate structure of the roads as applied to Government traffic.

Expanding governmental activities during the period following the passage of the Act of 1924, caused an unprecedented increase in the movement over these railroads of vast quantities of property of the United States and a corresponding increase in the travel of civilian employees charged with the administration of these activities. All such traffic was entitled to move at 50% of the regular commercial rates. This traffic was excluded from the benefits of the reduced rates by the Transportation Act of 1940, enacted pursuant to recommendations of Committees appointed by the President and by the War Department.[3]

81 In its brief the Government suggests that in enacting the Transportation Act of 1940 Congress had in mind the probable involvement of this Country in war in the near future, and it is contended that the words "military or naval property of the United States moving for military or naval and not for civil use" must be interpreted in the light of conditions then existing.[4]

In March 1941, after eighteen months of hostilities in Europe and with German and Italian conquests expanding, Congress enacted legislation designed to "further * * * promote the defense of the United States, and for other purposes," known as the Lend-Lease Act. Public Law 11, 77th Congress, Chapter 11, First Session, H. R., 1776. At that time England stood alone and concern regarding a realization of a Japanese threat to the United States mounted.

The Act confers upon the President almost unlimited discretionary powers and among others (Section 3) "to manufacture * * * or otherwise procure * * * any defense

82 article for the government of any country whose defense the President deems vital to the defense of the United States", and "To Sell, transfer title to, exchange, lease; lend, or otherwise

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[3] See House Document No. 583 of the 75th Congress, 3rd Session; Hearings, 76th Congress, House Committee on Interstate and Foreign Commerce, H. R. 2531, Vol. I, pp. 259–308, at pages 271–2; Report of Hearings House Committee on Interstate and Foreign Commerce, 75th Congress, pp. 16–17.

[4] In reconstructing the scene, passing reference may be made to some of the more important related legislative enactments of the period, with the respective dates. Alien Registration Act, 1940, 540 Stat., 673, June 28, 1940; Army Reserve and Retired Personnel Service Law of 1940, 54 Stat., 858, August 27, 1940; Selective Training and Service Act of 1940, 54 Stat., 885, Sept. 16, 1940; Alien Veterans' Act, 54 Stat., 1149, Oct. 14, 1940; Soldiers and Sailors Civil Relief Act of 1940, 54 Stat., 1178, Oct. 17, 1940. The Alien Agency Act, 54 Stat., 631, had been amended on August 7, 1939. The Neutrality Acts were the subject of Congressional action in 1940. Other references to contemporary occurrences might be made.

dispose of, to any such government any defense article * * * after consultation with the Chief of Staff of Army or the Chief of Naval Operations of Navy, or both. * * *." And "* * * to lease for export any defense article disposed of in any way * * * to any such government." The term "defense article" is defined as meaning, among other things, "any agricultural, industrial or other commodity or article for defense." The term is further defined as including any article manufactured or procured pursuant to Section 3 or to which the United States or any foreign government had or thereafter acquired title, possession or control. Provision is made that the President shall transmit to Congress reports of operations under the Act.

This legislation has been supplemented from time to time by various acts appropriating necessary funds and as of September 25, 1944, seventeen reports of such operations had been submitted to Congress.

It is stipulated that the property involved in the instant case was being transported for the United States; that the property constituted "defense articles", as defined in the Lend-Lease Act; that when requisition is made by any country the defense of which the President deems vital to the defense of the United States,
83 such requisition is carefully considered and scrutinized and is issued, modified or rejected in accordance with the determination by the President or his properly authorized representative as to whether or not such shipment will promote the defense of the United States in accordance with the provisions of the Act. It is further stipulated that either party may refer to the official published reports made to Congress by the President as provided in the Act and to Rules of the Comptroller General without the formal introduction of such Reports and Rules.

To reach a determination of this case the Court must determine whether under the Transportation Act of 1940 the phosphate rock and superphosphate was, first, military or naval property of the United States, and second, moving for military or naval and not for civil use. Both queries require an affirmance in order to sustain the Government's position.

The second question does not involve a consideration of the nation by which the property might be put to military or naval use. Such use of the property by a power other than the United States would seem to be such military or naval use as would be sufficient for the requirement of the Act.

While phosphate rock and superphosphate may be used for various purposes, it is stipulated that the shipment here involved was destined for use as agricultural fertilizer supplied the farmer in Great Britain under the Lend-Lease Act and was moving over

a land-grant railroad. The stipulation contains the following language:

84 "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food-importing nation, was cut off from many sources of supply. Imports were further restricted by shortage of shipping. Great Britain therefore found it necessary to revise her agricultural practices in order to intensify production of food for direct human consumption. It was necessary to put into production a large acreage of land normally not used for the production of food for direct human consumption, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program. The shipments of phosphate rock and superphosphate comprised a part of that program. Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act."

The Lend-Lease Act contains no language indicating an intention on the part of Congress to modify the terms of the Transportation Act nor does it define materials acquired thereunder as being intended or destined for military or naval use unless it be considered that the term "defense" as there employed necessarily implies such use. It is urged that in waging modern warfare all resources of a country are mobilized and articles heretofore considered as nonmilitary assume such character in conducting what has been termed "total war." England has been likened to a besieged fortress and it is contended that such assistance as was rendered that country was assistance in carrying on the war in a military sense. The contention of the Government is briefly

85 summed up in the following quotations from its brief:

"In an integrated war economy, the supply of raw materials, the exploitation of the industrial plant, and the utilization of the land for food production are directly related to war. With modern science and changed methods of war transforming many substances once considered unimportant for a belligerent's purposes into strategic military material, the general language 'military property' cannot be limited to the precise items which would have been embraced within it centuries ago."

And further:

"It is not suggested that food stuffs, or phosphate are necessarily 'military property,' as such. However, under the particular conditions of war or defense, they can become indispensable to military functioning. When owned by the United States, and

devoted to a war or defense use, they take on a character of military property. Military and nonmilitary articles can be classified only after appropriate consideration has been given to the pressures, the exigencies and the practice of the times. Thus, even when food was not considered to be contraband unless moving for direct army use, it was recognized that the proclamation of a warring government could impress it with the character of contraband." Citing Balfour, Guthrie and Company v. Portland and Asiatic S. S. Company, 167 Fed. 1010 (D. Ore.); Spiegel, Economics of Total War (1942), p. 287.

This line of reasoning, if followed to its logical conclusion, would obliterate any distinction between the civilian and the military in time of war.

In adopting the language of the Transportation Act, Congress recognized a distinction between military or naval property and other property of the Government and it recognized the distinction between military or naval property moving for
86 military or naval use and such property moving for civil use. As has been pointed out, the Act was passed at a time when there existed a threat of involvement of this country in total war on a world-wide stage, the serious nature of which is realized when it is recalled that the threat resulted in an accomplished fact within less than fifteen months from the time Congress acted. The United States along with the world, was a close observer of the methods of waging "total war" and Congress was fully aware that modern wars engage the full resources of belligerent nations. Nevertheless, the Act clearly recognizes the distinction between the civil and the military. Appropriate language might have been used basing the exception upon the existence of a state of war, but this was not done.

An examination of the reports made to Congress by the President of the operations under the Lend Lease Act shows the nature of the property transferred to be almost as various as the property itself and as varied as the nations participating. For example, the report of August 24, 1944, lists 46 foreign countries as participating and the articles distributed embrace, among other things, ordnance and combat ships upon the one hand and dried beans and skimmed milk upon the other. Beginning in December 1941, 1,300,000 small children received a regular supply of concentrated orange or black currant juice and of cod liver oil compound.

While the agencies employed in acquiring these varied articles are not specifically reflected in respect of each item,
87 the Lend Lease Act and the Defense and Supplemental Appropriation Act provide for authorization by the President in this connection of not only the Secretary of War and

the Secretary of the Navy, but the head of any other department or agency of the Government.

In the several reports a distinction is drawn between military and nonmilitary goods. For example, in the report of August 24, 1944, Table No. 3, appearing on page 11, is denominated: "Quantities of Non-Military Goods Transferred," and among other items lists fertilizer—the article with which we are now concerned. Similar instances appear at many places in the various reports and innumerable illustrations of the transfer of articles strictly for use by civilians might be shown.

It would appear that Congress adopted or approved this interpretation. The President has repeatedly reported to Congress the distribution of huge quantities of nonmilitary and distinctly civilian goods and with these reports before it Congress has endorsed and approved this course by enabling its continuance by the enactment of the necessary appropriation acts.

The construction given to a statute by the Executive Department charged with its administration is entitled to great weight.[5]

Fertilizer is an article of value defensively. That fact has been determined by the President and stipulated by the
88 parties and the Court and has no authority to review or inquire into such determination. But does the identity of an article as being of value or use in defense of the nation necessarily imply a military or naval and not civil use? It may have a potential military value. Phosphate concededly does have value or use in the manufacture of munitions but that is not the use to which this particular shipment was moving.

Among other definitions, Funk and Wagnalls Standard Dictionary of the English Language, defines "defense" as: "To defend; vindicate; fortify * * *," and "defend" as: "To protect or shield from attack or violence; guard against threatened or offered harm; to make a stand for, or uphold by force or argument; maintain against attack, encroachment or opposition; maintain; vindicate, as to defend the course of the administration * * *."

"Military" is defined as: "Of or pertaining to soldiers, arms or warfare * * * soldierly, warlike; martial; done, supported, or carried on by force of arms; assigned to or occupied by troops."

"Civilian" is defined as: "One who follows civil pursuits as distinguished from military, naval or clerical."

"Civil" means: "Pertaining to a citizen in regard to ordinary affairs; opposed to ecclesiastical or military."

Unless technically employed, language is to be given its ordinary meaning and from the definitions cited it follows that while the

[5] U. S. v. Jackson, 280 U. S., 183; U. S. v. American Trucking Association, 310 U. S., 534; National Lead Company v. U. S., 252, U. S., 140.

term "defense" may and often does carry with it the idea of force, it does not necessarily mean the use of physical
89 force. Upon the contrary it may, and often does mean the employment of efforts unrelated to physical force. Translated to terms of the individual it may mean the peaceful application to a court of law for protection against a threat to property. On the part of the state it may mean draining a swamp to defend the health of the citizens or the construction of housing projects to provide accommodations for civilians employed in industries producing war materials.

Between the terms "military" and "civil" there is a wide distinction. "Military use" or "martial use," which may be considered for the present purpose as embracing "naval use," suggests the thought of physical force with destruction as its exclusive ultimate aim. It does not carry with it the idea of even constructive force. The bridge erected by the engineers is not a bridge for use by those engaged in peaceful civilian pursuits, but is a mere temporary expedient to be utilized in advancing while seeking out the enemy to destroy him.

Among other agencies of the Government created for the specific purpose of aiding in the prosecution of the war are the Office of Price Administration and the War Production Board, the underlying purpose of both being to combat financial inflation and resulting confusion on the home front. In addition to agencies of such nature, the regular civilian establishments of the Government are charged with responsibilities essentially related to the war effort. For example, upon the United States Attorney rests among other duties those of prosecuting persons
90 charged with evading service in the armed forces and acquiring sites for training those called to such service.

It could hardly be contended that a typewriter or other supplies for use of any of those agencies is military or naval property of the United States or that it is moving for military or naval and not civil use.

If such a construction should be placed upon the Transportation Act, the words "and not civil" would have no meaning, although those words were obviously intended to have a meaning and were employed at a time and under circumstances indicating danger of war.

I am unable to draw a distinction under the Transportation Act between the status of fertilizer moving for use by a farmer in Cornwall or a farmer in Haiti under the Lend-Lease Act, and fertilizer moving for use by a farmer in the middle west furnished by the Government under appropriate provisions of the Agricultural Adjustment Administration. All are engaged in the pro-

duction of agricultural products essential for the successful prosecution of the war. All are producing with fertilizer which moved as property of the United States; all are engaged in one of the most traditional of all civilian occupations, constituting the antithesis of destructive effort and as far removed from martial activities as can be imagined, and all are working to supply their respective markets with such surplus as may be available.

91 It is therefore my conclusion that the phosphate rock and superphosphate, within the meaning of the Transportation Act, was not military or naval property of the United States and was moving for civil use; that the counterclaim asserted by the Government should be dismissed and judgment should be rendered the plaintiffs in accordance with the prayer of the petitioner.

(S) STERLING HUTCHESON,
United States District Judge.

NORFOLK, VIRGINIA, March 24, 1945.

92 In United States District Court

Civil Action No. 321

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

Order entering judgment and dismissing counterclaim

Entered and filed April 9, 1945

This day came the parties, by their attorneys, and the Court has fully considered the questions arising upon the pleadings and proofs, and arguments of counsel thereon, all the facts having been stipulated by the parties in writing filed in this Cause. The Court adopts the facts as stipulated as its findings of fact. The Court is of the opinion for reasons stated in writing filed in the Cause on March 24, 1945, setting forth its conclusions of law, that the petitioners are entitled to recover, and doth so decide and that the defendant is not entitled to recover on its counterclaim. Accordingly, the Court doth adjudge, order and decree that the said Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, do recover of the United States of America, the sum of Six Hun-

dred and Thirty-seven Dollars and Fifty-four Cents ($637.54), and its costs as provided by law. It is further adjudged, ordered and decreed that the counterclaim filed by the defendant is hereby dismissed and that this case be removed from the docket.

(Sgd.) STERLING HUTCHESON,
United States District Judge.

Dated at Norfolk, Virginia, April 9, 1945.

96 **Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit**

No. 5406

UNITED STATES OF AMERICA, APPELLANT

vs.

LEGH R. POWELL, JR. AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

July 27, 1945, the transcript of record is filed and the cause docketed.

August 3, 1945, the appearance of W. R. C. Cocke and F. S. Sargeant is entered for the appellees.

August 7, 1945, the appearance of Thomas L. Preston is entered for the appellees.

September 10, 1945, the appearance of Harry H. Holt, Jr., U. S. Attorney, and Walkley E. Johnson, Assistant U. S. Attorney, is entered for the appellant.

September 12, 1945, stipulation to continue case to the November term, 1945, is filed.

Order continuing case to November Term, 1945

Filed September 15, 1945

[Style of Court and title omitted.]

Upon the stipulation of the parties hereto, and for good cause shown, it is ordered that the above entitled case be, and it is
97 hereby, continued from the October Term to the November Term, 1945.

September 13, 1945.

JOHN J. PARKER,
Senior Circuit Judge.

October 11, 1945, the appearance of John F. Sonnett, Hubert F. Margolies and Frederick Chait is entered for the appellant.

October 12, 1945, petition of appellant for permission to file brief in excess of fifty printed pages is filed.

Same day, order granting special permission to appellant to file brief in excess of fifty printed pages but not exceeding one hundred printed pages is filed.

October 16, 1945, brief and appendix on behalf of the appellant are filed.

Same day, petition of appellees for permission to file brief in excess of fifty printed pages is filed.

October 18, 1945, order granting special permission to appellees to file brief in excess of fifty printed pages but not exceeding seventy-five printed pages is filed.

October 31, 1945, brief on behalf of the appellees is filed.

Argument of cause

November 7, 1945 (November term, 1945), cause came on to be heard before Soper and Dobie, Circuit Judges, and Barksdale, District Judge, and was argued by counsel and submitted.

98 In United States Circuit Court of Appeals,
Fourth Circuit

No. 5406

UNITED STATES OF AMERICA, APPELLANT

vs.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk

(Argued November 7, 1945.—Decided December 13, 1945)

Before SOPER and DOBIE, Circuit Judges, and BARKSDALE, District Judge

Opinion

Filed December 13, 1945

99 Hubert H. Margolies, Attorney, Department of Justice, (John F. Sonnett, Assistant Attorney General; Harry H. Holt, U. S. Attorney; Walkley E. Johnson, Assistant U. S. Attor-

ney; Frederick Chait and Irvin M. Gottlieb, Attorneys, Department of Justice, on brief) for Appellant; and Thomas L. Preston (W. R. C. Cocke and F. S. Sargeant on brief) for Appellees.

DOBIE, Circuit Judge:

This case involves only one question. Phosphates, owned by the United States (hereinafter called Government) where shipped over the Seaboard Air Line Railway (hereinafter called Seaboard), consigned to the British Ministry of War Transport under the Lend-Lease Act, for use as fertilizer by the farmers of Great Britain. Did these phosphates fall within the category "military or naval property of the United States moving for military or naval and not for civil use", as those words were used in Section 321 (a) of the Transportation Act of 1940? The District Court decided this question in the negative and thus determined that Seaboard was entitled to collect from Government the full commercial freight rates, rather than the reduced rates specified for such property moving over Land Grant Railroads. Government has appealed.*

100 So far as it is pertinent here, Section 321 (a) of the Transportation Act of 1940 reads:

"Notwithstanding any other provision of law, * * * the full applicable commercial rates * * * shall be paid for transportation by any common carrier subject to the Act of any * * * property for the United States or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *."

To us, the opinion of Judge Hutcheson (60 F. Supp. 533) is so clear and its reasoning so cogent that we might well affirm the judgment below and adopt that opinion of our Court. We shall content ourselves with a brief opinion.

Government contends that, at the time of the enactment of the Transportation Act, England was in a desperate plight in World War II, and that, since this titanic struggle involved and deeply touched the lives of all the citizens of a warring country, the phrase "military or naval" must be given a very broad meaning. With this we heartily agree. We also give cheerful assent to Government's assertion that the Lend-Lease Act was enacted as a defense measure, not as a program of humanitarian charity. But we cannot go along with Government's contention that, as a neces-

*In connection with this case, the following extract from United States Law Week, November 27, 1945, Volume 14, No. 20, may be of interest: "Conference Agrees on Land Grant Rate Repeal—Senate and House conferees last week unanimously adopted a report on H. R. 694, which would repeal land grant railway rates pursuant to which the United States, in return for vast grants of land to certain railroads, had been entitled to substantially lower freight rates than those charged to other shippers on such roads."

sary consequence, all goods, regardless of their nature, function, or use, shipped to England under the Lend-Lease Act were "military or naval property," "moving for military or naval and not for civil use," as these words were used in the Transportation Act.

The Transportation Act was passed before the Lend-Lease Act. Sympathies in this country then ran strongly against the
101 Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale. Yet, with this picture before it, we must presume that Congress deliberately used the words "military or naval" in their generally accepted meaning. And we cannot accept Government's statement that the words "not for civil use" in the Transportation Act were mere surplusage. On the contrary, we think those words clearly show a distinction (however difficult in practice) between the military or naval on the one hand, and the civil on the other hand. Had this not been the Congressional intention, appropriate words for that purpose were readily available.

And even stronger reason against the Government's contention is the fact that the whole history and administration of the Lend-Lease Act show definitely that two separate types of assistance were contemplated: (1) military or naval; (2) civil. Nowhere is this more cogently shown than in the numerous reports of President Roosevelt to Congress on just what had been done in administering the Lend-Lease Act. On the strength of these reports, Congress continued to make further Lend-Lease appropriations and no amendment of the Transportation Act was made or sought.

A few items from these reports of the President (which could be indefinitely multiplied) must suffice. Thus Chapter 3 of the Fourth Report (pages 19–21) expressly divides Lend-Lease goods already shipped into three classes: (1) Military, (2) Industrial, and (3) Agricultural. A like classification is found in the
102 Fifth Report (page 9). The same is true of the Seventh Report where (page 9) it is stated: "Exports of *military* items have arisen much more rapidly than exports of *nonmilitary* items." [Italics ours.] The Third Report (pages 24–26) mentions the appearance of Lend-Lease Goods "on the grocers' shelves and in the kitchens of Great Britain," and states that 1,300,000 small children were receiving "a regular supply of concentrated orange or black-current juice, and of cod liver oil compound." The Tenth Report (page 20) mentions "supplies needed to prevent a breakdown of the *civilian* economy." [Italics ours.] Finally, in the Fifteenth Report (page 38) we find: "*Civilian* supplies shipped to French Africa under Lend-Lease. * * * We have

sent to Tunisia and Morocca, for example, equipment to increase production of the phosphate mines. The fertilizer produced by these mines is needed both for the United Kingdom's intensive food production program and for the restoration of food production in the liberated areas of occupied Europe." [Italics ours.]

The last quotation seems to bear directly on the instant case. For here we have phosphate mines connected only with the production of fertilizer; the use of fertilizer associated with agriculture; the whole designated and included within the clear category of Civilian supplies.

The judgment of the District Court is affirmed. Affirmed.

103 United States Circuit Court of Appeals, Fourth Circuit

No. 5406

UNITED STATES OF AMERICA, APPELLANT

vs.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF THE SEABOARD AIR LINE RAILWAY COMPANY, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Virginia

Judgment

Filed and Entered December 13, 1945

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
U. S. Circuit Judge.
ARMISTEAD M. DOBIE,
U. S. Circuit Judge.
A. D. BARKSDALE,
U. S. District Judge.

104 On another day, to wit, January 14, 1946, the mandate of this Court, in this cause is issued and transmitted to the District Court of the United States for the Eastern District of Virginia, at Norfolk, in due form.

105 Supreme Court of the United States

[Title omitted.]

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that for the purpose of the petition for a writ of certiorari the printed record may consist of the following:

1. Appendix B to brief for appellant in the United States Circuit Court of Appeals for the Fourth Circuit.

2. The proceedings had before the United States Circuit Court of Appeals for the Fourth Circuit, including the opinion of said Court.

It is further stipulated and agreed that petitioner will cause the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to file with the Clerk of the Supreme Court a complete certified transcript of the record on appeal in the Circuit Court of Appeals for the Fourth Circuit; and that, in the event the petition for writ of certiorari is granted, the printed record shall consist of the proceedings in the Circuit Court of Appeals for the Fourth Circuit, including the opinion of said Court, and such portions of the complete transcript of record on appeal in that court as the parties may designate.

It is further stipulated and agreed that either of the
106 parties hereto may refer in his brief to the record filed in the Supreme Court of the United States.

Dated this 4th day of March 1946.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General,
Attorney for Petitioner.

W. R. C. Cocke,
Thomas L. Preston,
F. S. Sargeant,
Attorneys for Respondents.

107 In United States Circuit Court of Appeals

Order authorizing clerk to use original transcript of record in making up record for use in the Supreme Court of the United States on application for writ of certiorari

For reasons appearing to the Court, it is ordered that the Clerk of this court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications

for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcript of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records.

JOHN J. PARKER,
Senior Circuit Judge.

JANUARY 9th, 1941.

108 [Clerk's certificate to foregoing transcript omitted in printing.]

109 Supreme Court of the United States

Order allowing certiorari

Filed April 29, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

110 In the Supreme Court of the United States

Stipulation

Filed Aug. 8, 1946

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on the writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted April 29, 1946, the printed record may consist of the following:

1. The material contained in the printed transcript of record (consisting of 30 pages) used for the purposes of the petition for writ of certiorari herein.

2. The following additional portions of the complete transcript of the record on appeal in the Circuit Court of Appeals:

a. Respondents' petition in the District Court of the United States for the Eastern District of Virginia, and exhibit thereto.

b. Petitioner's answer and counterclaim.

c. Respondents' reply to petitioner's counterclaim.

111 d. Exhibits 1 and 3 (a) to the Stipulation of Facts consisting of copies of bills of lading numbered respectively DA–TPS–190186 and DA–TPS–190194 which are stipulated and agreed to be typical of the bills of lading covering the shipments involved in the above-entitled case.

e. Exhibit 2 to the Stipulation of Facts consisting of a copy of Seaboard Air Line Railway Company's bill (TD–130–140) for $2,608.70, which is stipulated and agreed to be typical of its bills rendered by said company for transportation charges on the shipments involved in the above-entitled case.

f. Exhibit 5 to the Stipulation of Facts consisting of a copy of the Comptroller General's decision B–29861, dated October 12, 1943.

g. The second page of Exhibit 7 to the Stipulation of Facts, the said page being entitled "Invitation, Bid, and Acceptance," and forming a part of the contract covering the purchase of the superphosphate involved in the above-entitled case.

h. "Exhibit A" to the Supplemental Stipulation of Facts, consisting of a copy of letter dated September 21, 1943 from E. R. Stettinius, Jr., Lend-Lease Administrator, to Roy F. Hendrickson, Deputy Food Administrator, War Food Administration.

3. This stipulation.

It is further stipulated and agreed that in the briefs and argument of either party reference may be made to any portion of the transcript of record which is not included in the printed record prepared as aforesaid and that either party may refer to the official published reports made to Congress by or on behalf of the President pursuant to the terms of the Lend-Lease Act.

Dated this sixth day of August 1946.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General,
Attorney for Petitioner.

W. R. C. Cocke,
W. R. C. Cocke,
Thomas L. Preston,
Thomas L. Preston,
F. S. Sargeant,
F. S. Sargeant,
Attorneys for Respondents.

U. S. GOVERNMENT PRINTING OFFICE: 1946